A

Kalaivanan a/l Subramaniam v Public Prosecutor

B HIGH COURT (JOHOR BAHRU) — CRIMINAL APPEAL NO 42S-04–05 OF 2016
COLLIN SEQUERAH J
27 JULY 2017

C *Criminal Law — Appeal — Appeal against conviction and sentence — Accused convicted for offences under s 7 of the Firearms (Increased Penalties) Act 1971 and under s 33 of the Arms Act 1960 — Accused sentenced to life imprisonment and six strokes of rotan for first charge; and five years' imprisonment from date of arrest and two strokes of rotan for second charge — Whether learned trial judge failed to consider contradiction in time at which exhibits were discovered was material — Whether learned SCJ erred when she held that accused in possession of exhibits based on information leading to discovery under s 27 of the Evidence Act 1950 — Whether learned trial judge failed to consider defence's case — Whether prosecution proven prima facie case — Whether defence failed to cast doubt on prosecution's case — Whether conviction and sentence by trial judge correct*

D

E

F *Evidence — Information leading to facts discovered — Information leading to discovery — Accused provide information to police officer on whereabouts of subject matter of charges — Whether information admissible under s 27 of the Evidence Act 1950*

G The accused was charged for the offences under s 7 of the Firearms (Increased Penalties) Act 1971 ('the FA') ('the first charge') and under s 33 of the Arms Act 1960 ('the AA') ('the second charge'). The prosecution's case was that, based on the information given by the accused, the police officers found two bags which contained the firearms (subject matter of the first charge), ammunition (subject matter of the second charge) and some documents ('the exhibits') on top of the ceiling of the accused's house. In defence, the accused denied that he showed

H where the two bags were kept. On top of that, one of the defence's witness, SD2 testified that the exhibits were place on top of the ceiling by one Mano on 28 August 2014 when they attended the accused's open house. At the end of the trial, the sessions court judge ('the SCJ') convicted the accused on both the charges and sentenced the accused to life imprisonment and six strokes of the

I *rotan* for the first charge; and five years' imprisonment from date of arrest and two strokes of the *rotan* for the second charge respectively. Aggrieved by the decision, the accused filed the present appeals against both conviction and sentence. The main issues raised by the accused were: (a) whether the learned SCJ failed to take into account that the contradiction in time (between the

prosecution's witnesses) at which the exhibits were discovered was material; (b) whether the learned SCJ erred when she held that the accused was in possession of the exhibits based on information leading to discovery under s 27 of the Evidence Act 1950 ('the EA') and the discovery of the accused's personal documents in both the bags; and (c) whether the learned SCJ failed to consider the defence's case.

Held, dismissing the appeals and affirming the sentences passed by the SCJ on the appellant in respect of both the charges:

(1) It must be remembered that the witnesses were testifying as to events that happened some time ago compared to the date of the trial. Different witnesses are bound to have different perceptions with respect to the time at which events occurred. In the ordinary course of human nature, no two people remember exactly the time at which an event happened. Therefore, the court did not find that the difference in the approximate times amounted to material contradictions and lead to the possibility that the event of the discovery of the exhibits was re-enacted upon the arrival of the investigating officer to deliberately connect the accused with the exhibits (see paras 44–46 & 52).

(2) In the ordinary nature of things, the bags could not have been recovered had it not been for the information given by the accused. The place where the bags were recovered from were not exposed and could not have been seen by mere ordinary observation. This information could only have been forthcoming from the accused if he had knowledge of the whereabouts of the offending exhibits and not otherwise. The discovery of the exhibits itself afforded the security that the information was given by the accused and this could be safely admitted under the provisions of s 27 of the EA. The court found no flaw in the admission of the information given by the accused by the sessions court (see paras 56–58).

(3) The discovery of documents in the name of the accused in the bags established a nexus between the exhibits and the accused and further raised the reasonable inference that the accused was in actual possession of the exhibits found in the bags. In any event, even without the presence of the documents, the element of possession was still proven as the accused had given information leading to discovery of the bags under s 27 of the EA. As it was also proven that the accused was in possession of more than two firearms, the presumption arose that the accused was trafficking in the firearms pursuant to s 7(2) of the FA. As there was no evidence that the accused had any permit or license to keep the ammunition, this raised the reasonable presumption that it was used or intended for use for unlawful purposes. Under all the circumstances, the SCJ was correct in finding that the prosecution had made out a prima facie case (see paras 66, 71, 75 & 77–78).

(4) It was unreasonable that a house owner such as the accused would be completely unaware of what was hidden in his own house. The SCJ found that the personality of Mano was an invention on the part of the defence because the existence of Mano was never put to the prosecution's witnesses (SP8 and SP10). The court found that the SCJ was correct in describing the accused's defence as an invention and concocted to exculpate himself from the charge. The SCJ had not erred in fact or in law in finding that the defence had failed to raise reasonable doubt in the prosecution case. The findings of fact made by the SCJ were with the benefit of the audio visual advantage of the witnesses. The court found no good or compelling reason to disturb those findings. Therefore, this was not a case that justified appellate interference (see paras 82–83, 87 & 90–91).

(5) The SCJ had correctly held that the public interest was the foremost consideration. Although the SCJ had considered the mitigating factors including the fact that the accused was a first offender, she also correctly held that the offence committed was serious in nature. The SCJ also took judicial notice of the prevalence of such offences as reported over the social media. The SCJ was well justified in taking judicial notice of the incidence of these statistics. Under all the circumstances, the learned SCJ had not erred in principle in passing the sentences and neither were the sentences passed manifestly excessive (see paras 92–95).

[Bahasa Malaysia summary

Tertuduh telah dituduh kerana kesalahan-kesalahan di bawah s 7 Akta Senjata Api (Penalti Lebih Berat) 1971 ('ASPLB') ('pertuduhan pertama') dan di bawah s 33 Akta Senjata 1960 ('AS') ('pertuduhan kedua'). Kes pendakwaan adalah bahawa, berdasarkan maklumat yang diberikan oleh tertuduh, pegawai-pegawai polis telah menemui dua beg yang mengandungi senjata api (hal perkara pertuduhan pertama), peluru (hal perkara pertuduhan kedua) dan beberapa dokumen ('ekshibit-ekshibit') di atas siling rumah tertuduh. Dalam pembelaan, tertuduh menafikan bahawa dia telah menunjukkan di mana dua beg itu disimpan. Tambahan lagi, salah seorang saksi defendan, SD2 telah memberi keterangan bahawa ekshibit-ekshibit itu telah diletakkan di atas siling oleh Mano pada 28 Ogos 2014 apabila mereka menghadiri rumah terbuka tertuduh. Di akhir perbicaraan, hakim mahkamah sesyen ('HMS') telah mensabitkan tertuduh atas kedua-dua pertuduhan dan menjatuhkan ke atas tertuduh hukuman penjara seumur hidup dan enam sebatan rotan untuk pertuduhan pertama; dan lima tahun penjara dari tarikh tangkapan dan dua sebatan rotan untuk pertuduhan kedua masing-masingnya. Isu-isu utama yang ditimbulkan oleh tertuduh adalah: (a) sama ada HMS yang bijaksana telah gagal untuk mengambil kira bahawa percanggahan masa (antara saksi-saksi pendakwaan) di mana ekshibit-ekshibit itu ditemui adalah penting; (b) sama ada HMS yang bijaksana terkhilaf apabila beliau memutuskan bahawa

tertuduh mempunyai milikan ekshibit-ekshibit itu berdasarkan maklumat yang membawa kepada penemuan di bawah s 27 Akta Keterangan 1950 ('AK') dan penemuan dokumen peribadi tertuduh dalam kedua-dua pertuduhan; dan (c) sama ada HMS yang bijaksana telah gagal mempertimbangkan kes pembelaan.

Diputuskan, menolak rayuan-rayuan dan mengesahkan hukuman-hukuman yang diputuskan oleh HMS ke atas perayu berkaitan kedua-dua pertuduhan:

(1) Ia perlu diingat bahawa saksi-saksi memberi keterangan berhubung kejadian-kejadian yang berlaku beberapa lama dahulu berbanding dengan tarikh perbicaraan. Saksi-saksi yang berbeza pasti mempunyai persepsi berbeza berkenaan masa kejadian-kejadian itu berlaku. Dalam perjalanan biasa alam manusia, tidak ada dua orang ingat dengan tepat masa di mana suatu peristiwa berlaku. Oleh itu, mahkamah tidak mendapati bahawa perbezaan dalam anggaran masa itu membentuk percanggahan material dan membawa kepada kebarangkalian bahawa kejadian penemuan ekshibit-ekshibit telah dilakukan semula selepas ketibaan pegawai penyiasat untuk dengan sengaja mengaitkan tertuduh dan ekshibit-ekshibit itu (lihat perenggan 44–46 & 52).

(2) Dalam sifat keadaan yang biasa, beg-beg itu tidak mungkin boleh ditemui jika bukan kerana maklumat yang diberikan oleh tertuduh. Tempat di mana beg-beg itu ditemui tidak terdedah dan tidak mungkin dapat dilihat dengan hanya penelitian biasa. Maklumat ini hanya boleh dijangkakan daripada tertuduh jika dia mempunyai pengetahuan tentang di mana eskhibit-ekshibit yang bersalah itu dan tidak sebaliknya. Penemuan ekshibit-ekshiit itu sendiri telah memberikan jaminan bahawa maklumat itu telah diberikan oleh tertuduh dan ini boleh dengan selamat diterima masuk di bawah peruntukan s 27 AK. Mahkamah tidak mendapati apa-apa kecacatan dalam penerimaan masuk maklumat yang diberikan oleh tertuduh oleh mahkamah sesyen (lihat perenggan 56–58).

(3) Penemuan dokumen-dokumen atas nama tertuduh dalam beg-beg itu membuktikan kaitan antara ekshibit-ekshibit itu dan tertuduh dan selanjutnya menimbulkan inferens yang munasabah bahawa tertuduh mempunyai milikan sebenar ekshibit-ekshibit yang ditemui dalam beg-beg itu. Dalam apa keadaan, walau pun tanpa kewujudan dokumen-dokumen itu, elemen milikan masih dibuktikan kerana tertuduh telah memberi maklumat yang membawa kepada penemuan beg-beg di bawah s 27 AK. Oleh kerana ia juga dibuktikan bahawa tertuduh mempunyai milikan lebih daripada dua senjata api, suatu andaian timbul bahawa tertuduh telah mengedar senjata api menurut s 7(2) ASPLB. Oleh kerana tiada keterangan bahawa tertuduh mempunyai apa-apa permit atau lesen untuk menyimpan peluru, ini

menimbulkan andaian yang munasabah bahawa ia telah digunakan atau diniatkan bagi kegunaan untuk tujuan yang menyalahi undang-undang. Di bawah kesemua keadaan, HMS adalah betul dalam mendapati bahawa pendakwaan telah membuktikan suatu kes prima facie (lihat perenggan 66, 71, 75 & 77–78).

(4) Ia adalah tidak munasabah bahawa pemilik rumah seperti tertuduh tidak langsung menyedari apa yang disembunyikan di alam rumahnya sendiri. HMS mendapati bahawa personaliti Mano adalah suatu rekaan di pihak pembelaan kerana kewujudan Mano tidak pernah dikemukakan kepada saksi-saksi pendakwaan (SP8 dan SP10). Mahkamah mendapati bahawa HMS adalah betul dalam menggambarkan pembelaan tertuduh sebagai suatu rekaan dan dibuat secara palsu untuk mengelakkan dirinya daripada pertuduhan itu. HMS tidak terkhilaf dari segi fakta atau undang-undang bahawa pembelaan telah gagal menimbulkan keraguan munasabah dalam kes pendakwaan. Penemuan fakta yang dibuat oleh HMS adalah bermanfaat kerana mempunyai kelebihan visual audio saksi-saksi tersebut. Mahkamah mendapati tiada sebab kukuh atau menarik untuk mengganggu penemuan tersebut. Oleh itu, ini bukan suatu kes yang mewajarkan campur tangan rayuan (lihat perenggan 82–83, 87 & 90–91).

(5) HMS telah memutuskan dengan wajar bahawa kepentingan awam adalah pertimbangan utama. Walaupun HMS telah mempertimbangkan faktor-faktor mitigasi termasuk fakta bahawa tertuduh adalah pesalah kali pertama, beliau juga telah memutuskan dengan wajar bahawa bahawa kesalahan yang dilakukan adalah bersifat serius. HMS juga mengambil notis kehakiman tentang kelaziman kesalahan-kesalahan sedemikian sepertimana dilaporkan dalam media sosial. HMS adalah wajar dalam mengambil notis kehakiman berhubung kejadian statistik-statistik tersebut. Dalam semua keadaan, HMS yang bijaksana tidak terkhilaf secara prinsipnya dalam memutuskan hukuman-hukuman itu dan hukuman-hukuman yang diputuskan itu juga jelas tidak melampau (lihat perenggan 92–95).]

Notes

For cases on appeal against conviction and sentence, see 4(1) *Mallal's Digest* (5th Ed, 2015) paras 42–83.

For cases on information leading to discovery, see 7(2) *Mallal's Digest* (5th Ed, 2017 Reissue) paras 2427–2431.

Cases referred to

Chan Pean Leon v PP [1956] 1 MLJ 237 (refd)
Chean Siong Guat v PP [1969] 2 MLJ 63 (refd)
Francis Antonysamy v PP [2005] 3 MLJ 389, FC (refd)
Goi Ching Ang v PP [1999] 1 MLJ 507, FC (refd)

P' ng Hun Sun v Dato' Yip Yee Foo [2013] 6 MLJ 523, CA (refd)
PP v Datuk Haji Harun bin Haji Idris (No 2) [1977] 1 MLJ 15 (refd)
Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd [1986] 2 MLJ 30, SC (refd)
Periasamy s/o Sinnappan & Anor v PP [1996] 2 MLJ 557, CA (refd)
Yee Ya Mang v PP [1972] 1 MLJ 120 (refd)

Legislation referred to

Arms Act 1960 ss 2, 33
Criminal Procedure Code s 316
Evidence Act 1950 ss 8, 24, 27, 57
Firearms (Increased Penalties) Act 1971 ss 2, 7, 7(2)
Indian Evidence Act 1872 [IND] s 27

Ayasamy Velu (Renukadevi Krishnasamy and Aravindraj with him) (V Samy & Co) for the appellant.
Nor Iffa Zarila bt Abd Rahman (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Collin Sequerah J:

INTRODUCTION

[1] This the appellant's appeal against the decision of the Sessions Court at Kota Tinggi given on 22 May 2016, where the appellant was convicted and sentenced for two offences under s 7 of the Firearms (Increased Penalties) Act 1971 (Act 37) and under s 33 of the Arms Act 1960 respectively.

THE CHARGES

[2] The charges are set out hereunder.

First amended charge:

> Bahawa kamu pada 15.09.2014 jam lebih kurang 8.15 malam bertempat di No 14, Jalan Tay Kia Hong, Taman Sri Lalang, di dalam daerah Kota Tinggi, dalam Negeri Johor telah didapati memilik 3 laras senjata api dengan menyalahi undang-undang iaitu:
>
> (i) Sepucuk pistol jenis Colt Defender series 90, No Siri: DR 28356, warna croom berserta satu kelopak magazine.
>
> (ii) Sepucuk pistol revolver warna kehitaman 38 S&B Special CTG ber-Butt-kayu
>
> (iii) Selaras senjatapi warna kehitaman berserta satu kelopak magazine

Dan dengan itu hendaklah dianggap sebagai berdagang senjatapi. Oleh yang demikian kamu bersama-sama telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 7 Akta Senjata Api (Penalti Lebih Berat) 1971.

[3] The offence being punishable with life imprisonment and whipping with not less than six strokes.

Second amended charge:

Bahawa kamu pada 15.09.2014 jam lebih kurang 8.15 malam bertempat di No.14, Jalan Tay Kia Hong, Taman Sri Lalang, di dalam daerah Kota Tinggi, dalam Negeri Johor telah didapati dalam kawalan kamu

(i) 353 butir peluru hidup

Dalam hal keadaan yang menimbulkan suatu anggapan yang munasabah bahawa ia telah digunakan atau bercadang atau hendak menggunakan amunisi tersebut untuk apa-apa tujuan yang menyalahi undang-undang. Oleh yang demikian, kamu telah melakukan suatu kesalahan yang boleh dihukum di bawah seksyen 33 Akta Senjata 1960.

[4] The offence being punishable for a term not exceeding seven years imprisonment or to a fine not exceeding RM10,000 or to both, and shall also be liable to whipping.

[5] The appellant claimed trial and was convicted on both amended charges. Upon conviction, the appellant was sentenced to life imprisonment and six strokes of the *rotan* for the first amended charge and five years imprisonment from date of arrest and two stokes of the *rotan* for the second amended charge respectively.

FACTS OF THE CASE

Prosecution's case

[6] The pertinent facts giving rise to the above offences revealed that at about 6.30pm, on 15 September 2014, acting on information received, SP8 from the Special Task Force On Organised Crime ('STAFOC') Bukit Aman together with a team conducted a raid at a car wash at Taman Kota Jaya, Kota Tinggi, Johor, where they arrested the appellant and several other male Indians. According to SP8, the appellant attempted to flee but was apprehended.

[7] All those arrested were brought back to the IPD, Kota Tinggi. At around 7.45pm, SP8 and ASP Riduan interrogated the appellant as a result of which certain information was revealed to the police by the appellant. This

information was written on a piece of paper signed by both the appellant and SP8. This piece of paper was admitted in evidence with some obliteration as exh P84.

[8] Based on the said information, and directed by the accused, the police team was led to a house at No 14, Jalan Tay Kia Hong, Taman Sri Lalang Kota Tinggi ('the said house'). Upon arrival at the said house, a woman named Prema (SP2) who was the wife of the appellant, opened the door.

[9] The appellant then led SP8 and the raiding party to the kitchen area where the appellant told them that the 'things' were kept 'on top' and indicated using his mouth and hands toward the direction of the ceiling.

[10] SP8 instructed ASP Ridzuan ('SP9') to climb up on to the ceiling with a torch light. SP9 then informed that he found two bags after which SP8 instructed both bags to be taken down.

[11] After the investigating officer ('SP10') arrived at the said premises, SP8 opened both the bags witnessed by the appellant. In the said bags were found the exhibits that comprised the subject matter of the charges and some documents. The contents of the bags were then taken out one by one and were marked by SP8. SP8 then prepared a search list (exh P73(A–E)) which was signed by the appellant. This search list was later handed over to SP10 after photographs were taken of the exhibits.

[12] All the exhibits were dusted for fingerprints and extraction of DNA was carried out. The firearms and ammunition were also sent to SP7 for testing for serviceability and found to be in working condition and serviceable and then sent to the forensics laboratory in Cheras for profiling.

[13] The appellant claimed trial to the charges. At the end of the prosecution case, the learned sessions court judge (SCJ) ruled that the prosecution had made out a prima facie case against the appellant in respect of both amended charges and called upon him to make his defence.

Defence case

[14] The defence of the appellant was that on 15 September 2014 at around 6.30pm, he and seven others were arrested at the car wash at Taman Kota Jaya, Kota Tinggi after which they were brought to IPD Kota Tinggi for interrogation.

[15] As a result of the interrogation, the appellant denied that he knew anything about a pistol, bullets and a bag in his house but told SP8 that a person named Suriya Prasad and Jayakumar had informed him that there were bullets and a pistol hidden in the ceiling of his house. The appellant said he signed P84 which contained a record of certain information given, only because he was forced to and beaten by the police and he denied giving the said information.

[16] At around 7.45pm, the appellant brought SP8 and his team to his house at No 14, Jalan Teh Kia Hock, Taman Sri Lalang, Kota Tinggi. They arrived there around 8pm. The wife of the appellant ('SP2') opened the door. The appellant and SP2 were brought to the master bedroom where SP2 was instructed to handover certain documents belonging to the appellant namely, exhs P80, P81, P82 and P83 over to SP9.

[17] SP2 was instructed by the police to sit in the living room while SD1 was brought to the prayer room, the store room and then to the kitchen. In the kitchen SP9 climbed up the ceiling and with the aid of a torchlight found two bags. After the bags were taken down, SP8 opened and placed the appellant's documents in the bags.

[18] After that, SP8 instructed SP9 to return the bags to their original position and cover up the ceiling. The appellant denied that he showed where the two bags were kept. After the arrival of the photographer, the two bags were taken down from the ceiling for the second time and brought to the living room. The contents of the bags were taken out and the appellant was told that the contents belonged to him.

[19] The appellant confirmed SP2's evidence that on 28 August 2014, there was an open house because of his house warming occasion at his home attended by Suriya Prasad, Jayakumar, Manoharan ('Mano') and others. According to the appellant, at about 10.30pm, he was intoxicated and was with his friends until 1am. The appellant after that locked the door to the house while Suriya Prasad and Jeyakumar closed the front gate.

[20] SD2 who was arrested together with the appellant on 15 September 2014 was brought with the others arrested to IPD Kota Tinggi and isolated from the others. According to SD2 after he was threatened by the police, he told them that there was a pistol on top of the ceiling in the kitchen in the appellant's house.

[21] SD2 said that on 28 August 2014, while he was at home, he received a call from Mano asking him to do something important. At 9.15am, when he

arrived at Mano's house, Mano told him to go to Plentong at Masai. Mano gave SD2 one Thambi's telephone number to contact after arrival at Plentong and Thambi would give him a bag.

[22] SD2 then called Suriya Prasad and asked him to accompany him to Plentong. SD2 left Suriya Prasad at a shop and went alone into a kampong and met with Thambi. Thambi gave SD2 two bags which he kept in his car boot.

[23] On the same day at around 6.30pm, SD2 invited Surya Prasad to the appellant's open house. At around 10pm, Mano requested for SD2's car keys and took the two bags and brought them inside the appellant's house. According to SD2, only he and Surya Prasad saw Mano place both the bags on top of the ceiling. Mano told SD2 that there were pistols in both bags. SD2 did not inform the appellant that the bags were inside the ceiling as he was prevented by Mano from doing so.

[24] On 28 August 2014 at around 9.30am, SD2 invited SD3 to follow him to Plentong to meet Thambi. At around 11am, SD2 dropped him off at a mamak restaurant and after half an hour, SD2 returned to pick him up and went back to Kota Tinggi.

[25] On the same day at around 8pm, SD3 together with SD2 arrived at the appellant's open house. There, SD3 saw SD2 engaged in a conversation with Mano and saw him hand over car keys to Mano. SD3 saw Mano proceeding in the direction of SD2's car.

[26] SD3 said that at the time he was drunk and could not remember what happened after that. At around 10.30pm or 11pm, SD3 returned home together with SD2. According to SD3, after they were arrested on 15 September 2014, he did not know the whereabouts of Mano and what had happened to him.

PRINCIPLES REGARDING APPELLATE INTERFERENCE

[27] The duty upon a court hearing an appeal from a subordinate court is set out in s 316 of the Criminal Procedure Code and reads:

> 316 Decision on appeal
>
> At the hearing of the appeal the Judge may, if he considers there is no sufficient ground for interfering, dismiss the appeal, or may —
>
> (a) in an appeal from an order of acquittal, reverse the order, and direct that further inquiry be made, or that the accused be re-tried, as the case may be, or find him guilty and pass sentence on him according to law;
>
> (b) in an appeal from a conviction or in an appeal as to sentence —

(i) reverse the finding and sentence and acquit or discharge the accused, or order him to be re-tried; or

(ii) alter the finding, maintaining the sentence, or with or without altering the finding reduce or enhance the sentence or alter the nature of the sentence;

(c) in an appeal from any other order, alter or reverse such order.

[28] In the case of *Periasamy s/o Sinnappan & Anor v Public Prosecutor* [1996] 2 MLJ 557, Gopal Sri Ram JCA (as His Lordship then was), had this to say:

In the state of the law, what was the duty and function of the learned judge on appeal? His duty and function have been the subject of discussion in a great many cases and for purposes we find it sufficient to refer to two of these.

In *Lim Kheak Teong v Public Prosecutor* [1985] 1 MLJ 38, the sessions court acquitted the accused on two charges under the Prevention of Corruption Act 1961, after having heard his defence. On appeal, the High Court set aside the order of acquittal and substituted therefor an order of conviction. The accused applied under the now repealed s 66 of the Courts of Judicature Act 1964 to reserve a question of law. In allowing the application and quashing the conviction, the Federal Court, whose judgment was delivered by Hashim Yeop Sani FJ (later CJ Malaya) said (at pp 39–40):

... we gave leave because firstly we felt that there was no proper appraisal of *Sheo Swarup v King-Emperor* AIR 1934 PC 227, the appellate judge went into conflict with the trend of authorities in similar jurisdictions.

With respect, what Lord Russell of Killowen said in *Sheo Swarup* was that *although no limitations should be placed on the power of the appellate court, in exercising the power conferred 'the High Court should and will always give proper weight and consideration to such matters' as*:

(1) *the views of the trial judge on the credibility of the witnesses;*

(2) *the presumption of innocence in favour of the accused;*

(3) *the right of the accused to the benefit of any doubt; and*

(4) *the slowness of an appellate court in disturbing a finding of fact arrived at by a judge who had the advantage of seeing the witnesses.*

Lord Reid reiterated this same principle in *Benmax v Austin Motor Co Ltd* [1955] AC 370 at p 375 where he quoted from Lord Thankerton's judgment in *Watt (or Thomas) v Thomas* [1947] 1 All ER 582 that:

> Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, *an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion*.

> The learned appellate judge held that the learned President had 'misdirected himself on the explanation of the accused.' Given the facts as stated in the appeal record, can it be said that there was a misdirection? Or can it be said that the decision of the learned President was 'plainly unsound'? (*Watt (or Thomas) v Thomas*). On the facts of this case we do not think so. (Emphasis added.)

The principles that operate to justify a court hearing an appeal interfering with the decision of the trial court has also been set out in the case of *P' ng Hun Sun v Dato' Yip Yee Foo* [2013] 6 MLJ 523, where the Court of Appeal held:

> *When the finding of the trial judge is factual, however the fact finders decision cannot be disturbed on appeal unless the decision of the fact finder is plainly wrong* (see *China Airlines Ltd v Maltran Air Corp Sdn Bhd (formerly known as Maltran Air Services Corp Sdn Bhd) and another appeal* [1996] 2 MLJ 517; [1996] 3 CLJ 163; *Zaharah A Kadir v Ramuna Bauxite Pte Ltd & Anor* [2011] 1 LNS 1015; *Kyros International Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [2013] 2 MLJ 650; [2013] 1 LNS 1.
>
> *The findings of fact of the trial judge can only be reversed when it is positively demonstrated to the appellate court that:*
>
> (a) *By reason of some non-direction or misdirection or otherwise the judge erred in accepting the evidence which he or she did accept; or*
>
> (b) *In assessing and evaluating the evidence the judge has taken into account some matter which he or she ought not to have taken into account; or*
>
> (c) *It unmistakably appears from the evidence itself, or from the unsatisfactory reasons given by the judge for accepting it, that he or she cannot have taken proper advantage of his or her having seen and heard the witnesses; or*
>
> (d) *In so far aside the judge has relied on manner and demeanour, there are other circumstances which indicate that the evidence of the witness which he or she accepted is not credible, as for instance, where those witnesses have on some collateral matter deliberately given an untrue answer.* (Emphasis added.)

ANALYSIS AND DECISION

[29] The main issues raised by the appellant in the course of the appeal as evident from their written and oral submissions were as follows:

(a) failure of the learned sessions court judge ('SCJ') to take into account that the contradiction in the time at which the exhibits were discovered was material;

(b) the SCJ erred when she held that the appellant was in possession of the exhibits based on information leading to discovery under s 27 of the Evidence Act 1950 and the discovery of the appellant's personal documents in both the bags; and

(c) failure to consider the defence case.

[30] These will be considered in turn.

Failure of the learned sessions court judge (SCJ) to take into account that the contradiction in the time in which the exhibits were discovered was material

[31] Learned counsel for the appellant submitted that the testimonies given by SP4 and SP5 during examination-in-chief was that they arrived at the house of the appellant ('the house') on 15 September 2014 at around 10pm. SP6 gave evidence that he arrived at the house at around 9pm together with police officers and the investigating officer ('IO').

[32] SP8 in examination-in-chief said that he arrived at the house at 8.15pm, while in cross-examination he confirmed that he arrived at the house at about 8.15pm, and left the house at about 1am. SP8 said the bags were discovered between 8.15–10pm.

[33] In re-examination, SP8 said that he arrived at the house between 8.15–10pm, and brought the bags down around 9pm. SP8 also said that while photographs of the bags were being taken, Insp Irwan bin Ishak ('SP10'), the investigating officer (IO) arrived at around 10pm.

[34] SP9 said that he arrived at the house at around 8.15pm together with Tn Hazril and another member of the police force. Upon arrival they went straight to the kitchen and climbed up the ceiling which took 45 minutes. SP10 during cross-examination testified that he was informed of the discovery of the firearms and ammunition and he arrived at the house around 9.30pm.

[35] The appellant submitted that according to the testimonies of SP8, SP9 and SP10, the exhibits were supposedly discovered after the investigating officer (IO), SP10, arrived at the house.

[36] This was confirmed by the evidence of SP10 as follows:

> Saya dimaklumkan megenai penemuan senjata api dan peluru semasa saya tiba ditempat kejadian lebih kurang 9.30 malam.

[37] It was submitted that this contradicted with the search list, exh P73, which confirmed that the exhibits were recovered at 8.15pm. SP9 on the other hand said that the exhibits were found at 9pm.

[38] SP8 also testified that the IO (SP10) arrived at the house after the bags were found. This means that the exhibits were already found when SP10 arrived at the house. If SP10 arrived at the house at around 9.30pm, I fail to see the contradiction between his testimony and the search list (P73) which

recorded the exhibits as being found at 8.15pm. In any event, it is not in dispute that the exhibits were already found before the arrival of SP10 and these were at different times.

[39] Notwithstanding, the appellant submitted that when SP9 and his team arrived at the house, SP9 and his team ransacked the house and brought the exhibits down from the ceiling after which they then placed the exhibits back onto the ceiling to await the arrival of the IO.

[40] It was also pointed out that while SP8 said that it took about 45 minutes to bring down the exhibits as they faced difficulty, this was never mentioned by SP10.

[41] It was finally submitted that all of these contradictions raised the possibility that the police had entered the house several times where at the first instance the bags were brought down from the ceiling at 8.15pm. After this, the police then placed the bags in the ceiling again and re-enacted the earlier scene when the appellant was brought in.

[42] The appellant submitted further that the reason this scenario had to be re-enacted or re-staged for the benefit of the IO was because the bags and the firearms actually belonged to persons named Vijayakumar, Suria Prasad and Uganathan.

[43] In addition, it was submitted that as there were in fact no personal belongings of the appellant found in the bags, the police had to re-enact the scene at 9.30pm after placing the appellant's personal documents in the bags.

[44] The contradictions referred to involve a difference as to the time when the police arrived at the house of the appellant. I do not however, find that merely because there is some discrepancy as to time, that this necessarily means that the police re-enacted the whole scene upon the arrival of the IO so as to 'frame' the appellant. SP8 also categorically denied that the said house was searched before the exhibits were discovered.

[45] It must be remembered that the witnesses were testifying as to events that happened some time ago compared to the date of the trail. Different witnesses are bound to have different perceptions with respect to the time at which events occurred. Indeed, if the witnesses' memories were too exact with respect to detail, it would then be open to the attack that the evidence was concocted or rehearsed.

[46] In the ordinary course of human nature, no two people remember

exactly the time at which an event happened. See *Chean Siong Guat v Public Prosecutor* [1969] 2 MLJ 63 and *Public Prosecutor v Datuk Haji Harun bin Haji Idris (No 2)* [1977] 1 MLJ 15 where observations were made regarding discrepancies in the testimonies of witnesses.

[47] The charge places the time at which the police arrived at the house as approximately 8.15pm. SP8 and SP9 testified that the raiding party arrived at around 8.15pm. They also took some time to bring the bags down from the ceiling in the kitchen after the appellant had pointed them out. SP8 had confirmed in evidence that SP10 arrived after the exhibits were discovered. The SCJ had also correctly observed that the IO (SP10) only arrived after the exhibits were found and hence the difference in the approximate times.

[48] SP10 testified that upon his arrival, he instructed the photographer to take progressive photographs showing the actions of the appellant in pointing out the exhibits and the actions of the raiding party subsequent to that. This in itself does not necessarily mean that the whole event of the discovery was staged upon the arrival of the IO as contended by learned counsel for the appellant.

[49] There was also no evidence that the appellant was known to any of the members of the raiding party prior to that day and therefore there was no axe to grind so to speak with the appellant.

[50] It also does not make sense as suggested by counsel for the appellant that in actual fact the event of discovery of the exhibits had to be re-enacted and re-staged because the exhibits in fact belonged to persons named Vijayakumar, Suria Prasad and Uganathan, as none of them apart from the appellant was brought to the said house.

[51] If any of these other persons had the requisite knowledge of where the exhibits were located, it would stand to reason that they or any one of them would have been brought to the said house in order to point out the location of the exhibits.

[52] To place things in further perspective, SP10's failure to mention the fact that it took about 45 minutes to bring the bags down was simply because he was not there when the discovery took place. Also when SP10 in his evidence said that it took about one minute, he was referring to the time it took to take the photographs.

[53] I do not therefore find that the difference in the approximate times as stated in the evidence amount to material contradictions and lead to the

possibility that the event of the discovery of the exhibits was re-enacted upon the arrival of the IO in order to deliberately connect the appellant with the exhibits.

The SCJ erred when she held that the appellant was in possession of the exhibits based on information leading to discovery under s 27 of the Evidence Act 1950 and the discovery of the appellant's personal documents in both the bags

[54] The prosecution evidence revealed that while in the presence of SP8 on 15 September 2014 at around 19.45 hours, the appellant uttered the words, 'itu barang saya boleh tunjuk kepada Tuan'. These words were handwritten in a document (exh P84). P84 had certain words preceding the words stated above obliterated.

[55] This led the police to the house of the appellant. Upon arrival at the house, the appellant pointed to the ceiling in the kitchen. The result of this was the discovery of two bags which contained the incriminating exhibits in this case.

[56] In the ordinary nature of things, the bags could not have been recovered had it not been for the information given by the appellant. The place where the bags were recovered from were not exposed and could not have been seen by mere ordinary observation.

[57] The raiding party testified that climbing up to retrieve the bags did take some time and effort. This information could only have been forthcoming from the appellant if he had knowledge of the whereabouts of the offending exhibits and not otherwise.

[58] The discovery of the exhibits itself affords the security that the information was given by the appellant and this can be safely admitted under the provisions of s 27 of the Evidence Act 1950. I therefore find no flaw in the admission of the information given by the appellant by the sessions court.

[59] In Sarkar's *The Law of Evidence* by LexisNexis, the commentary on the law relating to s 27 in India states as follows:

> *The section permits the proof of all kinds of information whether contained in a confession or not* and therefore goes beyond the provisions of ss 25 and 26. *When the information contained in the statements (whether amounting to a confession or not) made by an accused person in police custody are confirmed by the finding of some object or fact, the danger disappears*; for the discovery of the stolen goods, the instrument of crime, the dead body, the clothes which the deceased were wearing or any other material thing, which are capable of being perceived by the senses demonstrates conclusively that these portions at least of the confessions cannot have been false. *In*

such a case so much of the information given by the accused as relates distinctly to the fact thereby discovered becomes relevant under s 27. The word 'it' in the phrase 'Whether it amounts to a confession or not' refers to information.

... *The reason behind this partial lifting of the ban against confessions and statements made to the police, is that if a fact is actually discovered in consequence of information given by the accused, it affords some guarantee of truth of that part, and that part only of the information which was the clear, immediate and proximate cause of the discovery.*

Section 27 of the Indian Evidence Act is founded on a principle that even though the evidence relating to the confessional or other statements made by a person while he is in the custody of a police officer, is tainted and therefore inadmissible, if the truth of the information given by him is assured by the discovery of a fact, it may be presumed to be untainted and is therefore declared provable in so far as it distinctly relates to the fact thereby discovered.

Section 27 appears to be based on the view that if a fact is actually discovered in consequence of information given, some guarantee is afforded thereby that the information was true and accordingly it can be safely allowed to be given in evidence. [*Geejaganda Somaiah v State of Karnataka* 2007 CrLJ 1792; (1797) AIR 2007 SC 1355; 2007 AIR SCW 1681; 2007 (3) Crimes 38; 2007 (3) SCC (Cri) 135]. As the section is alleged to be frequently misused by the police, the Courts are required to be vigilant about its application. The Court must ensure the credibility of evidence by police because this provision is vulnerable to abuse. It does not, however, mean that any statement made in terms of the section must be viewed with suspicion and it cannot be discarded only on the ground that it was made to a police officer during investigation. The Court has to be cautious that no effort is made by the prosecution to make out a statement of accused with a simple case of recovery as a case of discovery of fact in order to attract the provisions of s 27 the Evidence Act. [*Geejaganda Somaiah v State of Karnataka* 2007 CrLJ 1792; (1797) AIR 2007 SC 1355; 2007 AIR SCW 1681; 2007 (3) Crimes 38; 2007 (3) SCC (Cri) 135].

The following are the requirements or condition for application of Section 27 of the Evidence Act:

(1) *That consequent to the information given by the accused, it led to the discovery of some fact stated by him.*

(2) *The fact discovered must be one which was not within the knowledge of the police and the knowledge of the fact was for the first time derived from the information given by the accused.*

(3) *Information given by the accused must lead to the discovery of a fact which is the direct outcome of such information.*

(4) *The discovery of the fact must be in relation to a material object and of course would then embrace within its fold the mental condition ie, the knowledge of the accused of the place where the object was produced and the knowledge that it was there.*

(5) *only such portion of the information as is distinctly connected with the said discovery is admissible.*

(6) *The discovery of the fact must relate to the commission of some offence.*

Fact discovered therefore, has to be a combination of both the elements, that is, physical object and mental condition. [*Amitsingh Bhikamsingh Thakur v State of Maharashtra,* (2007) 2 SCC 310 (321, 322); AIR 2007 SC 676; *Anter Singh v State of Rajasthan* (2004) 10 SCC 657; *State v Mohd Afzal* (2003) 107 DLT 385 (Del); *Azab Ali v State of Tripura* (2009) 1 Gauh LR 621 (Gauh-DB); *Prithviraj v State of Rajasthan* 2004 CrLJ 2190 (Raj); 2004 (4) Raj LW 2224; 2004 (2) Raj LR 514; *Surajbhan v State of Rajasthan* 2004 CrLJ (NOC) 289 (Raj); 2004 (2) Raj LW 874; 2003 (3) Raj LR 463]. It can be very well concluded that allowed to be proved is the information, such part thereof, as related distinctly to the fact thereby discovered. The word 'distinctly', means 'directly', 'indubitably', 'strictly' and 'unmistakably'. As per the settled proposition of law a statement made by the accused should be split up and so much of the statement that is the immediate cause of discovery will be a legal evidence under Section 27 of the Evidence Act.

Recovery affected under s 27 would become relevant and important, if only the recovered items were used in the commission of offence. [*Onteru Venkata Suba Reddy v State of AP* 2008 CrLJ 2870 (2873); 2008 (2) Andh LT (Cri) 89 (AP-DB)]. (Emphasis added.)

[60] Under all the circumstances, I find that the information leading to discovery had complied with all the above conditions prescribed by law and was rightfully admitted in evidence at the trial of the appellant. Further, the action of the appellant in indicating using his mouth, the hole in the ceiling in the kitchen where the bags were discovered is also admissible as evidence of conduct under s 8 of the Evidence Act 1950 through the evidence of SP9.

[61] The SCJ in her grounds considered the issue of exh P84 not being voluntary as the appellant had mentioned that he was forced and beaten. It is trite that the provisions of s 27 are exempt from the provisions in s 24 of the Evidence Act 1950.

[62] Voluntariness is not therefore a pre-requisite for the admission of information under s 27 of the Evidence Act 1950. See *Goi Ching Ang v Public Prosecutor* [1999] 1 MLJ 507 and *Francis Antonysamy v Public Prosecutor* [2005] 3 MLJ 389.

[63] It was held in *Yee Ya Mang v Public Prosecutor* [1972] 1 MLJ 120 in respect of s 27 that:

... when it is proved that the accused made a statement to the effect 'I have concealed the articles at a particular place and I will produce them' and if those articles are discovered in consequence of that statement, that would be evidence of his possession even though those articles were kept or concealed in another man's property, because unless he had possession he would not have kept them at that place.

A **[64]** In respect of possession, the SCJ had also relied upon the definition as propounded in the case of *Chan Pean Leon v Public Prosecutor* [1956] 1 MLJ 237. The SCJ had also observed that the landlord of the house occupied by the appellant had confirmed that there were no previous tenants thus ruling out the possibility that the incriminating exhibits could have been left there by
B previous tenants.

[65] She also observed that the offending exhibits were concealed from the view of the unsuspecting and thus making it not possible for them to have been discovered if not for the information supplied by the appellant.
C

[66] The discovery of documents in the name of the appellant in the bags also connected or established a nexus between the exhibits and the appellant and further raised the reasonable inference that the appellant was in actual
D possession of the exhibits found in the bags. In any event, I find as did the SCJ, that even without the presence of the documents, the element of possession was still proven as the appellant had given information leading to discovery of the bags under s 27 of the Evidence Act 1950.

E **[67]** The appellant contended that the personal documents connecting the appellant with the exhibits recovered were planted by the police. These were a Public Bank accounts book in the name of the appellant, an application form under 'Kementerian Asas Tani' and a Health Care AIA card in the name of the appellant found in one bag. In the other bag was found an assistant's
F repossession certificate, 'Sijil Pembantu Repossesor' in the name of the appellant.

[68] The appellant submitted however that SP2 testified she gave some
G documents to a police officer in plain clothes whose name she did not know and whom she was unable to identify. The appellant's thus submitted that some of these documents were planted by the police in the bags in order to connect the appellant to the exhibits found.

H **[69]** I agree with the assessment and finding made by the SCJ that the version of SP2 is unconvincing as despite her assertion, she was unable to remember who she gave the documents to and could not recognise or identify this police officer. There is also no evidence that the appellant knew any of the members of the police raiding party before the incident or vice versa.

I **[70]** This being the case, there is obviously no 'axe to grind' and therefore no obvious motive for the police to want to 'frame the Appellant'. The police would also unlikely take such a huge risk and put their careers in jeopardy in framing the appellant.

[71] The trail court had therefore correctly found that the appellant had possession and control of the firearm and ammunition respectively under the first and second amended charges.

[72] The firearms and the ammunition were also subjected to tests for serviceability and after testing found to be serviceable. This was further evidenced in the firearms report (P71).

[73] As it was also proven that the appellant was in possession of more than two firearms, the presumption arose that the appellant was trafficking in the firearms pursuant to s 7(2) of the Firearms Increased Penalties Act 1971 (Act 37).

[74] The said s 7(2) reads:

> Any person proved to be in unlawful possession of more than two firearms shall be presumed to be trafficking in firearms.

The phrase 'traffic in firearms' is defined in s 2 as follows:

> 'traffic in firearms' means —
>
> (a) to sell or transfer, or keep or expose for sale or transfer, a firearm in contravention of subsection 9(1) of the Arms Act 1960 [Act 206];
>
> (b) to repair or accept for repair a firearm in contravention of subsection 9(2) of the Act;
>
> (c) to transfer, sell or offer for sale a firearm to a person other than a person specified in subsection 11(1) of the Act; or
>
> (d) to import a firearm in contravention of subsection15(1) of the Act;
>
> (e) *(Deleted by Act A266)*.

[75] In respect of the second amended charge under s 33 of the Arms Act 1960, the ammunition was contained in the bags concealed in the ceiling of the appellant's house. The ammunition also could not have been possibly discovered if not for the information supplied by the appellant. This therefore enabled the element of possession to be sufficiently proven.

[76] SP7 had testified that all 353 bullets were live bullets and were able to be used to shoot or discharge. This fulfilled their definition as 'ammunition' under s 2 of the Arms Act 1960 defined as follows:

> 'ammunition' means ammunition (including blank ammunition) for any arm as hereinafter defined, and includes grenades, bombs and other like missiles, whether capable of use with arms or not, and any ammunition containing, or designed or adapted to contain, any noxious liquid, gas or other thing;

A [77] As there was no evidence that the appellant had any permit or license to keep the ammunition, this raised the reasonable presumption that it was used or intended for use for unlawful purposes.

B [78] Under all the circumstances, the SCJ was correct in finding that the prosecution had made out a prima facie case against the appellant in respect of both amended charges and accordingly called for his defence.

Failure to consider the defence case

C [79] In her evaluation of the defence case, the SCJ had given cogent reasons why she held that the defence failed to raise a reasonable doubt in the prosecution case.

D [80] With regard to the appellant's contention that during interrogation, SP8 had told him that SD2 and SD3 informed that they had hidden the firearms and ammunition in the appellant's house, the SCJ held that this was denied by SP8.

E [81] It is reasonable to expect that if SD2 was the one who had informed the police about the pistol, the police would have brought him instead to the appellant's house. The fact that the police only brought the appellant to his house and not the others enables the reasonable inference to be made that it was indeed the appellant and him only who had given the information regarding the whereabouts of the exhibits. Under the circumstances, the SCJ had made a correct finding of fact.

F

G [82] The SCJ also made the observation that it defied logic that the appellant would allow himself to be intoxicated to the extent that he was unaware that others had hidden the exhibits in the ceiling of his own house. I do not find any flaw in the reasoning of the SCJ. I find that it is unreasonable that a house owner such as the appellant would be completely unaware of what was hidden in his own house.

H [83] The version that the appellant was so intoxicated that he was unaware of this was concocted merely in order to explain away his knowledge of the exhibits and their location. The SCJ was therefore correct in describing the defence in this respect as an invention and concocted in order to exculpate himself from the charge.

I [84] The evidence of SD2 that SD3 had also witnessed Mano hiding two bags in the ceiling of the kitchen in the appellant's house was denied by SD3 himself. SD3 said that he only witnessed the said Mano going to SD2's car. After that he said he did not know what happened as he too was intoxicated.

[85] This clear contradiction between the evidence of SD2 and SD3 did nothing to advance the cause of the defence. The SCJ had observed this fact when she commented that the evidence of SD3 had corroborated the evidence of SD2 but only to the extent that he had seen Mano take the bags from the car bonnet.

[86] Even if this held true, it is not reasonable that the appellant would have been unaware of this fact.

[87] The SCJ held that the personality of Mano was an invention on the part of the defence. Her reasons, inter alia, were that his existence were never put to SP8 and SP10. This entitled the SCJ to justifiably characterise the existence of the said Mano as an afterthought and concocted merely to exculpate the appellant. I cannot see any flaw in her doing so.

[88] The allegation that SP8 had placed the personal documents in the bags had already been addressed.

[89] The evidence by the defence did not rebut on a balance of probabilities, the presumptions of trafficking in the firearms pursuant to s 7(2) of the Firearms Increased Penalties Act 1971 and the presumption that the ammunition was used or intended for use for unlawful purposes under s 33 of the Arms Act 1960.

[90] Taken as a whole, and based upon the available evidence, the SCJ had also not erred in fact or in law in finding that the defence had failed to raise a reasonable doubt in the prosecution case.

[91] The findings of fact made by the SCJ were with the benefit of the audio visual advantage of the witnesses. I see no good or compelling reason to disturb those findings. This was not a case that therefore justified appellate interference. In the premises, the appeals against conviction are dismissed.

SENTENCE

[92] With respect to sentence, the SCJ had correctly held that the public interest was the foremost consideration. She also held that upon conducting a balancing exercise between the public interest and the interests of the appellant, the public interest ought to take priority. I see no flaw in her doing so.

[93] Although the SCJ had considered the mitigating factors including the fact that the appellant was a first offender, she also correctly held that the

offence committed was serious in nature. The SCJ also took judicial notice of the prevalence of such offences as reported over the social media.

[94] The SCJ was well justified in taking judicial notice of the incidence of these statistics. The categories of judicial notice are not exhaustive and confined to the matters enumerated in s 57 of the Evidence Act 1950. See *Pembangunan Maha Murni Sdn Bhd v Jururus Ladang Sdn Bhd* [1986] 2 MLJ 30.

[95] Under all the circumstances, the learned SCJ had not erred in principle in passing the sentences and neither were the sentences passed manifestly excessive. The appeals against sentence are also dismissed. The sentences passed by the SCJ on the appellant in respect of both charges are affirmed.

Appeals dismissed; sentences passed by SCJ on appellant in respect of both charges affirmed.

Reported by Dzulqarnain Ab Fatar